l private
authority of the
l of any
vision or

igation"
f and to
money
rrency"
ncluding
Federal

osection
relieve
reasing
extra-
rgency.
cultural
tion of
proved

States
ulating
bank-
ned or
lic and
dues.
ndard
w for
valua-

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 384.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Petitioner,

vs.

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY,

Respondents.

BRIEF OF *AMICUS CURIAE* AND MOTION FOR LEAVE TO FILE SAME AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO SUBMIT SUPPLEMENTAL BRIEF.

HARRY HOFFMAN,
Counsel for Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., as Amicus Curiae,
No. 30 Pine Street,
New York, N. Y.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480. 39

IN THE

Supreme Court of the United States

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Petitioner, v. BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, Respondents.	OCTOBER TERM, 1938. No. 384.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND TO SUBMIT SUPPLEMENTAL BRIEF.

May it Please the Court:

Upon the consent of counsel for all parties hereto, filed herewith, the undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

The undersigned also respectfully moves this Honorable Court for leave to participate in oral argument, and for leave to submit a supplemental brief should this Court desire to consider certain questions raised in the courts below but not raised in the petition for the writ of certiorari herein.

Dated, New York, January 14, 1939.

Respectfully submitted,

HARRY HOFFMAN,
as *Amicus Curiae*.

INDEX.

PAGE

BRIEF OF AMICUS CURIAE 1

I—STATEMENT AS TO CONSENTS TO FILING THIS BRIEF .. 1

Interest of Amicus in the Matters in Controversy 2

Facts 4

The Questions Presented by the Petition 8

II—SUMMARY OF ARGUMENT 8

III—ARGUMENT 10

Preliminary Statement 10

POINT A.—The Joint Resolution is not applicable to the First Terminal Bonds and coupons. It does not extend to provisions of instruments which give the obligee a right to require payment other than (a) in gold or (b) in a particular kind of coin or currency of the United States or (c) in an amount in money of the United States measured thereby; nor does it extend to such instruments or "obligations" as are payable in money other than that of the United States 11

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the multiple currency features of the First Terminal Bonds and coupons at bar 11

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance; the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remain intact 15

PAGE

(3) Payment in guilders is not equivalent to payment in gold 19

(4) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right to demand and receive guilders. No public policy inhibits such payment 23

(5) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the multiple currency features of instruments payable in multiple currencies 27

(6) To hold that multiple currency clauses are condemned by the Joint Resolution would deprive the holders of First Terminal Bonds and coupons of their property without due process of law in violation of the Fifth Amendment 29

(7) The "Holyoke" Case 32

(8) Decisions of Federal and State Courts construing the Federal statute here involved as affecting multiple currency clauses 34

(9) No foreigners are parties to this proceeding or to this appeal, which is between a domestic corporate trustee on the one part, and a debtor in reorganization, its trustee, and its controlling stockholder, on the other part. 41

(10) Summary Statement regarding applicability of the Joint Resolution to multiple currency clauses 42

PAGE

POINT B.—Accepted Conflict of Laws doctrines are applicable in bankruptcy; the laws of Holland govern the performance of the instruments at bar; and under both American and Dutch law Petitioner's contentions as to performance are correct. 45

(1) The bankruptcy courts of the United States apply Conflict of Laws doctrines. 45

(2) Applying accepted Conflict of Laws doctrines to the Petitioner's proof of claim, the law of Holland,—the place where the contracts were by their terms to be performed,—governs. 46

(3) Under both American and Dutch law, Respondents' objections to Petitioner's proof of claim, in so far as based upon the Joint Resolution, are without merit and must fall. 47

POINT C.—The functional approach to Respondents' interpretation of the Joint Resolution discloses the fallacy of any such interpretation. 50

POINT D.—Damages should be assessed as of the date of the filing and approval of the petition for reorganization. 52

IV—CONCLUSIONS CONCERNING THE QUESTIONS RAISED BY THE PETITIONER. 55

APPENDIX A—Joint Resolution. i

TABLE OF CASES.

A.

PAGE

Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., 50 The T. L. R. 147 (1934) 49

American Banana Co. v. United Fruit Co., 213 U. S. 347 ..... 16, 48

Andrews v. Pond, 12 Peters 65, 67 25

Anglo-Continentale Treuhand, A. G. v. Bethlehem Steel Co., 6 N. Y. Supp. (2d) 334 (1938), modified and affirmed 254 App. Div. 844 ..... 4, 35, 36

Anglo-Continentale Treuhand, A. G. v. St. Louis Southwestern Railway Co., 81 Fed. (2d) 11, cert. den. 298 U. S. 657 ..... 3, 4, 14, 15, 16, 20, 23, 24, 25, 33, 34, 37, 38, 40, 41, 47, 49.

B.

Barnett, In re, 12 F. (2d) 73 (C. C. A. 2nd), cert. den. 273 U. S. 699 45

Board of County Commissioners v. Hurley, 169 Fed. 92 (C. C. A. 8th, 1909) 54

Bond v. Jay, 7 Cranch. 350 16

Brazilian Loans Case of Pom., Court of Int. Just., Series A, No. 20 (1929) 49

British & French Trust Corporation v. New Brunswick Railway Co., Ltd., 54 The T. L. R. 172 (1937) (Court of Appeals [aff'd House of Lords, Dec. 13, 1938, 55 The Times, L. R.] 48

British & French Trust Corporation v. New Brunswick Railway (1937), 4 All Eng. 516 (aff'd House of Lords, Dec. 13, 1938) 48

C.

PAGE

Cash v. Kennion, 11 Vesey 316 19
Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft et al., 15 F. Supp. 927 (U. S. D. C., S. D. N. Y.), aff'd 84 F. (2d) 993 (C. C. A. 2nd), cert. den. 299 U. S. 585 26
Central Trust Co. of Ill. v. Chicago Auditorium Ass'n, 240 U. S. 581 ..... 31, 53
Champion Shoe Machinery Co., In re, 17 Fed. Supp. 985 45
City Bank Farmers Trust Co. v. Bethlehem Steel Co., 244 App. Div. 634 ..... 17, 22, 24, 37, 38, 39
Clark v. Huckaby, 28 F. (2d) 154 (C. C. A. 8th, 1928), cert. den. 278 U. S. 648 46
Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland, 269 N. Y. 22, cert. den. 27 U. S. 705 ..... 14, 43, 44

D.

Deutsche Bank v. Humphrey, 272 U. S. 517, 519 ..... 52, 54
Douglis v. Deutsche Atlantische, etc., 166 Misc. 509 (N. Y.) 26
Dunlop v. Baker, 239 Fed. 193 (C. C. A. 4th), cert. den. 243 U. S. 650 31

F.

Feist v. Societe Intercommunale Belge d'Electricite, 50 The T. L. R. 143 (1934) 49
Fox v. Standard Oil Co., 294 U. S. 87, 55 Sup. Ct. 333, 79 L. Ed. 780 11

G.

Glynn v. United Steel Works Corporation, 160 Misc. 678 (N. Y.) 26
Goodman v. Deutsche Atlanische, etc., 166 Misc. 509 (N. Y.) 26

PAGE

Guaranty Trust Co. v. Henwood, 98 F. (2d) 160 (C. C. A. 8th) 40
Guaranty Trust Co. of N. Y. v. United States, 304 U. S. 126 (1938) 11

H.

Henwood Trustee v. Anglo-Continentale Treuhand, A. G., 298 U. S. 655 27
Hicks v. Guinness, 269 U. S. 71 (1925) 52, 54
Hilton v. Guyot, 159 U. S. 113, 163 16
Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324 ..... 32, 33
Hovey v. De Long Hook & Eye Co., 211 N. Y. 420, 429 (1914) 30
Hydropress Handels, A. G. v. Lackawanna Steel Co., New York Law Journal, May 7, 1938, p. 2221 (Wasservogel, J.) 37

I.

Irving Trust Co. v. Maryland Casualty Co. et al., 83 F. (2d) 168, 171-172 (C. C. A. 2nd), cert. den. 299 U. S. 571 46

J.

Jackson v. United States, 60 Ct. of Cl. 599 18

L.

La Corporation des Obligations Municipales Limitée v. Ville de Montreal-Nord, 59 Cour Superieure, 550 (Quebec) 17
Lann v. United Steel Works Corp., 166 Misc. (N. Y.) 465 ..... 26, 47
Lansdowne v. Faris (8th Cir.), 66 F. (2d) 939 11
Legal Tender Cases, The, 12 Wall. 457, 566 ..... 33, 52

PAGE

Les Commissaires D'Ecole de la Municipalite Scolaire de St. Charles v. La Societe des Artisans Canadiens-Francais, 33 Quebec K. B. 448 (1922) 17
Louisville Joint Stock Bank v. Radford, 295 U. S. 555. 29

M.

Marks v. United Steel Works Corporation, 160 Misc. 678 (N. Y.) 26
Mayer v. Hungarian Commercial, No. L. 7424, U. S. D. C., E. D. N. Y. (1927), decided July 7, 1934—Galston, J. 26
Maynard v. Elliott, 283 U. S. 273 ..... 31, 54
McAdoo v. Southern Pacific Co., 10 Fed. Supp. 953 (N. D. Cal., S. D.) 38, 39, 40
Merrill v. National Bank, etc., 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640 53
Mondiale Handels-und Verwaltunge and another v. Bethlehem Iron & Steel Corporation, New York Law Journal, June 13, 1936 37
Motor Products Mfg. Corp., In re, 90 F. (2d) 8 (C. C. A. 9th) 46

N.

National Labor Relations Board v. Jones & McLaughlin, etc., 301 U. S. 1 30
Nederlandsche Middenstandsbank N. V. and others v. Bethlehem Steel Co., New York Law Journal, June 13, 1936 37
Newark Shoe Stores, Inc., In re, 2 Fed. Supp. 384 (D. C. Md.) 46
Norcross v. Wills, 198 N. Y. 336, 341 23
Norman v. B. & O. R. R. Co., 294 U. S. 240, 303 .....
14, 15, 19, 27, 28, 33, 39, 43, 44

P.

PAGE

Pan-American Securities Corp. v. Fried. Krupp, 6 N. Y. Supp. (2d) 993 (1938) 26, 47
Pennsylvania Steel Co. v. New York City. Ry. Co., 198 Fed. 721 54
Perry v. Norddeutscher Lloyd (Bremen) (North German Lloyd), 150 Misc. 73 (N. Y.) 26

R.

Rex v. International Trustee, 53 The T. L. R. 507 (1937) 49
Roehm v. Horst, 178 U. S. 1 54
Rothschild v. Rio Grande Western R. Co., 84 Hun 103, 109 (1st Dept., 1895), aff'd 164 N. Y. 594 43
Russian Volunteer Fleet v. United States, 282 U. S. 481 41

S.

Samuels v. Drew (Claim of Eldorado Oil Works et al.), 292 Fed. 734 (C. C. A. 2nd, 1923) 53
Samuels v. Drew (Claim of Eldorado Oil Works et al.), 286 Fed. 278 (D. C., S. D. N. Y., 1922) 53
Samuels v. Drew (Claim of Produce Brokers, Ltd.), 286 Fed. 281 53
Samuels v. Drew (Claim of Banco Nacional Ultramariho), 296 Fed. 882 (C. C. A. 2nd, 1924) 54
Samuels v. Drew, 292 Fed. 754 (C. C. A. 2nd) 54
Sandberg v. McDonald, 248 U. S. 185 16
Schoenberger v. Watts, 5 Phila. 51, 56 (1882) 31
Scudder v. Union National Bank, 91 U. S. 406 (1875) . 47
Security-First National Bank v. Rindge Land & Navigation Co., 85 Fed. (2d) 557 (C. C. A. 9th) 31
Seeman v. Philadelphia Warehouse Co., 274 U. S. 403 (1927) 47
Serbian Loans, Case of the, Perm. Court of Int. Just. Serie A, No. 21 (1929) 49

PAGE

Sheppard v. Hamburg-Americanische Packetfahrt, Actien-Gesellschaft, N. Y. Law Journal, March 14, 1934, p. 1232 (Collins, J.), not elsewhere reported. 26
Simon, In re, 197 Fed. 105, D. C., W. D., N. Y..... 54
Sturgis v. Crowninshield, 4 Wheat. 122, 197, 17 U. S. 120, 196..... 14

U.

Union National Bank v. Chapman, 169 N. Y. 538..... 47
United Cigar Stores Co. v. Rayher, 273 U. S. 699..... 46
United States v. Delaware & Hudson Co., 213 U. S. 366, 407 (1909)..... 30
United States v. Moy, 241 U. S. 394, 401 (1916)..... 30
United States v. Standard Brewery, 251 U. S. 210, 40 S. Ct. 139, 64 L. Ed. 229..... 11

W.

Wong Wing v. United States, 163 U. S. 222..... 41

Z.

Zimmermann v. Sutherland, 274 U. S. 253..... 52
Zurich General Accident & Liability Ins. Co. v. Bethlehem Iron & Steel Co., New York Law Journal, June 13, 1936..... 37
Zurich General Accident & Liability Ins. Co. v. Bethlehem Steel Co., 164 Misc. 498, aff'd 254 App. Div. 839..... 16, 34, 35

TEXT BOOKS, TREATISES, ETC.

	PAGE
Black's Law Dictionary (2nd Ed.), p. 843	16
Dicey, Conflict of Laws (2nd Ed.) 563	49
Hare, American Constitutional Law (1889)	30
Moody's Manual of Railroads, 1938	30
Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa., L. R. 569, 571 (March, 1936)	15, 16, 23, 24, 27, 44
Restatement, Contracts, Sec. 236(d)	43
" " " 325(2)	43, 47
Restatement, Conflict of Laws, Sec. 364	25, 47
" " " " " 356(1)	42
" " " " " 358(a) and (e)	25
" " " " " 344	16
" " " " " 469	16
Restatement, Conflict of Laws, Sec. 423 [Comment (a)]	21
Remington on Bankruptcy, Vol. 2, Sec. 757	54
Williston on Contracts, Vol. III, Sec. 1963	23
" " " " " " 1961	25
" " " " " " 621 (p. 1203)	43

STATUTES AND REGULATIONS.

Bankruptcy Act, Sec. 63(a) (U. S. C. A., Title 11, Sec. 103)	54
Bankruptcy Act, Sec. 77 (Clause L, Amendatory of)	54
Dutch Civil Code, Arts. 1308 to 1313	25, 48
Executive Order No. 6560, January 15, 1934, by virtue of Section 5(b) of the Act of October 6, 1917 (40 Stat. L. 411), as amended by Section 2 of the Act of March 9, 1933	24
Joint Resolution of Congress of June 5, 1933 (Public Resolution No. 10, 73rd Congress, 48 Stat. 112)	
Netherlands, The, Law of July 18, 1904, Art. 1, Sec. 189	20
Presidential Proclamation of Jan. 31, 1934, and Provisional Regulations Thereunder—Art. 4, Secs. 28, 29	21

IN THE

Supreme Court of the United States

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912, Petitioner, v. BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY, Respondents.	OCTOBER TERM, 1938. No. 384.

BRIEF OF *AMICUS CURIAE*.

I.

STATEMENT AS TO CONSENTS TO FILING THIS BRIEF.

This brief is submitted pursuant to written consent, granted by counsel for all parties hereto, viz.: by counsel for Petitioner in a letter dated December 27, 1938: by counsel for Respondents Berryman Henwood, Trustee of St. Louis Southwestern Railway Company, Debtor, and St. Louis Southwestern Railway Company, in a letter dated December 28, 1938; and by counsel for Respondent Southern Pacific Company, in a letter dated December 28, 1938. Said letters are filed herewith.

INTEREST OF *AMICUS* IN THE MATTERS IN CONTROVERSY.

The interest of *amicus* in this litigation is as follows:

(a) *Amicus* is counsel for Anglo-Continentale Treuhand, A. G. (hereinafter, for convenience, referred to as "Treuhand"), a Liechtenstein corporation, with no office or place of business within the United States or the territorial limits thereof. Said Treuhand is the owner of 686 First Terminal and Unifying Mortgage 5% Bonds, due 1952 (hereinafter, for convenience, referred to as "First Terminal Bonds") of Respondent Debtor, with appurtenant coupons, which First Terminal Bonds are part of the same issue which is involved upon this appeal. Said First Terminal Bonds so owned are in the principal amount, as expressed therein in guilders, of Gl. 1,708,140, and in the principal amount, as expressed therein in dollars, of $686,000. Said Treuhand has filed a proof of claim in connection with its ownership of said First Terminal Bonds, which claim has been protested in part by Respondents herein.

Treuhand is also the owner of an unpaid portion of a judgment for $11,198.95, rendered in a suit against Respondent Debtor, in connection with coupons detached from First Terminal Bonds of the same issue. Said Treuhand has filed a proof of claim in connection with its ownership of said judgment, which claim has been protested by two of the Respondents herein.

(b) *Amicus* also represents Mondiale Handels-und Verwaltungs, A. G. (hereinafter, for convenience, referred to as "Mondiale"), a Liechtenstein corporation, with no office or place of business within the United States or the territorial limits thereof. Said Mondiale is the owner of 389 First Terminal Bonds, with appurtenant coupons. Said First Terminal Bonds so owned are in the principal amount, as expressed therein in guilders, of Gl. 958,610, and in the principal amount, as expressed therein in dollars, of $389,000. Said Mondiale has filed proofs of claim in connection with its

ownership of said First Terminal Bonds, which claims have been protested in part by Respondents herein.

(c) Pursuant to leave of the Circuit Court of Appeals for the Eighth Circuit, *amicus* filed a brief and participated in oral argument upon the appeal below in the instant case.

Amicus is also counsel in the following litigation, among others, involving in part questions similar to some of the questions involved upon this appeal:

(d) *Treuhand et al.* (all foreign corporations resident abroad) v. *Bethlehem Steel Company,* involving multiple currency coupons detached from multiple currency bonds issued by Bethlehem Steel Company, both similar to those at bar.

An appeal in said action was decided by the Court of Appeals (New York) January 11, 1939, holding, per curiam—two Judges dissenting—upon the authority of *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company,* referred to in subdivision (f), p. 4, *infra*, that the Joint Resolution does not bar payment in guilders on said coupons, and sustaining the contentions of the plaintiffs in said suit and of *amicus* herein in that connection. A petition for a writ of certiorari in said case is being presented to this Court by the losing defendant therein [see Point A(8), at p. 34 *et seq., infra*].

(e) *Hydropress Handels, A. G. et al.* (all foreign corporations resident abroad) v. *Bethlehem Steel Company,* upon multiple currency coupons, similar to those at bar, detached from multiple currency bonds issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company, now pending in the Appellate Division of the Supreme Court of the State of New York; *Treuhand* v. *Bethlehem Steel Company,* an action pending in the Supreme Court of the State of New York, Kings County, upon "called" multiple currency bonds and coupons, similar to those at bar, issued by Bethlehem Steel Company; *Melanie Plesch et al.* (all foreigners

resident abroad) v. *Bethlehem Steel Company,* an action pending in the Supreme Court of the State of New York, Kings County, upon "called" multiple currency bonds and coupons, similar to those at bar, issued by Bethlehem Steel Company; *Leonie Ulam et al.* (all foreigners resident abroad) v. *Bethlehem Steel Company,* an action pending in the Supreme Court of the State of New York, Kings County, upon "called" multiple currency bonds and coupons, similar to those at bar, issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company.

Presumably the fact that the Joint Resolution is not applicable to the instruments sued upon in all of the above-mentioned cases has now been established in New York State by the very recent ruling of the Court of Appeals in *Anglo-Continentale Treuhand, A. G.* v. *Bethlehem Steel Company,* referred to in subdivision (d), *supra,* and at p. 34 *et seq., infra.*

(f) *Amicus* also acted as counsel for the plaintiff in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company,* 81 Fed. (2d) 11, cert. den. (*sub. nom. Henwood* v. *Anglo-Continentale Treuhand, A. G.*) 298 U. S. 655, hereinafter sometimes referred to as "St. Louis Southwestern case," involving multiple currency coupons detached from multiple currency bonds of the very issue now before this Court, and in other multiple currency litigation; and is counsel in connection with other litigation brought or about to be brought on multiple currency bonds and/or coupons.

Facts.

In order to avoid duplication, no complete statement of facts is here presented, it being assumed that Petitioner and Respondents will sufficiently state them for the guidance of the Court.

We deem it useful, however, to set out certain relevant portions of the Record.

(1) The First Terminal Bonds contain, among others, provisions as follows (R. 19-21):

"$1,000. No. $1,000.
U. S. Gold U. S. Gold
£205 15s. 2d. Stg. 2490 Guilders
Marks 4200, D. R. W. 5180 Francs

UNITED STATES OF AMERICA.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
FIRST TERMINAL AND UNIFYING MORTGAGE BOND.

"St. Louis Southwestern Railway Company, a corporation of the State of Missouri (hereinafter called the Railway Company), for value received, hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One Thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, **or** in London, England, £205 15s 2d, ***or in Amsterdam, Holland, 2490 guilders,*** **or** in Berlin, Germany, marks 4200, D. R. W., **or** in Paris, France, 5180 francs, and to pay interest thereon, at the rate of five per cent. per annum, from the first day of January, 1912, in said respective currencies, semi-annually on the first day of January and the first day of July in each year, until payment of said principal sum, but only upon presentation and surrender, as they severally mature, of the interest coupons annexed hereto. Payment of the principal and interest of this bond will be made, **at the holder's option,** at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or ***at designated offices in the foreign cities and countries above mentioned.*** * * * " (Emphasis ours.)[1]

(2) The coupons appertaining to the First Terminal Bonds are in the following form (R. 22):

"$25. No. $25
105.05 Marks £5 2s 10½d.
129.50 Francs 63.25 Guilders.

"On the first day of , 19 , St. Louis Southwestern Railway Company will pay to the

[1] Unless otherwise noted, all emphasis in this brief is ours.

bearer, upon presentation and surrender of this coupon for cancellation, at its office or agency in the Borough of Manhattan, in the City of New York, Twenty-five Dollars ($25) in United States gold coin, or in London, England, £5, 2s. 10½d. Sterling, ***or in Amsterdam, Holland, 62.25 guilders,*** or in Berlin, Germany, 105.05 marks, or in Paris, France, 129.50 francs, being six months' interest then due upon its First Terminal and Unifying Mortgage Bond, No.....

.....
Treasurer."

(3) The Mortgage Indenture under which the First Terminal Bonds were issued contains, among others, the following provisions (R. 17-18):

"Whereas, the Railway Company, in pursuance of resolutions of its Board of Directors and of its stockholders, at meetings of said Board and of said stockholders duly convened and held in accordance with law and the by-laws of the Railway Company, has determined, for the purposes in this indenture set forth, to create its forty-year mortgage bonds, to be designated 'First Terminal and Unifying Mortgage Bonds,' limited to an aggregate principal amount of One Hundred Million Dollars ($100,000,000), at any one time outstanding, to be coupon bonds with provision for registration as to principal, and registered bonds without coupons, to be payable on the first day of January, 1952, with interest at the rate of five per cent. per annum, payable semi-annually on the first days of January and July in each year; said bonds, both as to principal and interest, to be payable at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed January 1, 1912 (the coupon bonds also to be payable, both as to principal and interest, at such places in the following cities in foreign countries as the Board of Directors may from time to time designate, viz.: London, England, or Amsterdam, Holland, or Berlin, Germany, or Paris, France), and both as to principal and interest without deduction for any tax or governmental charge which the Railway Company or the

Trustees may be required or permitted to pay or to retain therefrom under any present or future law of the United States of America or of any state, territory, county, municipality or other taxing authority therein; and

* * * * * *

"Whereas, the First Terminal and Unifying Mortgage Coupon Bonds may be payable, at the option of the holder, both as to principal and interest, at some one or more of the following places in addition to the City of New York, and in the moneys current at such respective places of payment, at the following rates of exchange or equivalents of $1,000, viz.: In London, England, £205.15.2 Sterling, **or in Amsterdam, Holland,** 2490 guilders, **or** in Berlin, Germany, 4200 marks, D. R. W., **or** in Paris, France, 5180 francs: and

"Whereas, the text of the First Terminal and Unifying Mortgage Bonds is to be in substantially the following form (the blanks in the form of registered bond without coupons to be properly filled as such bonds are issued):"

(Here follows the form of coupon bond containing the provisions hereinbefore set forth. See item (2), page 5, *supra*.)

(4) The prospectus used in the public offering and sale of the First Terminal Bonds in 1912 quoted from a letter written shortly after March 28, 1912, by the Debtor, through its President, to the Guaranty Trust Company, including among such quoted part the following (R. 133-134):

"Principal and interest of all bonds payable in gold in New York, and of coupon bonds also payable in London at £205 15s 2d sterling, **or in Amsterdam at 2,490 guilders, or** in Berlin at 4,200 marks, D. R. W., **or** in Paris at 5,180 francs, for each $1,000 of principal and at proportionate equivalents for installments of interest."

(5) The Debtor has never maintained an office or agency in Amsterdam, Holland, for the payment of interest or principal on said First Terminal Bonds (R. 132, 159). In reply

to an inquiry of the Committee on Stock List of the New York Stock Exchange regarding payment in foreign moneys in respect of the First Terminal Bonds, the Debtor, in January, 1934, notified said Exchange that the Company had no foreign paying agent, and had not provided funds for the payment of coupons pertaining to the Bonds in any currency other than that of the United States; and on or about January 13, 1934, the office of the Secretary of the New York Stock Exchange published its Bulletin containing a statement to that effect (R. 132).

(6) The foreign flavor of the transaction is further exemplified, among other things, by the facts set forth at R. 160 and by the letter (R. 172) from the Vice-President of the Debtor to the Vice-President of the Guaranty Trust Company, as well as by the letter (R. 173) from the Vice-President of the Guaranty Trust Company to the Secretary of the Debtor.

The Questions Presented by the Petition.

1. Does the Joint Resolution of Congress of June 5, 1933 (Public Resolution No. 10, 73rd Congress, 48 Stat. 112) operate to deprive the holders of First Terminal Bonds (and coupons) of the right to exercise the election to take guilders abroad, and if it does, is such deprivation in violation of the Fifth Amendment to the United States Constitution?

2. As of what date are damages to be assessed in these proceedings, i. e., as of what date is the value of the guilder to be taken in allowing proofs of claim herein?

II.

SUMMARY OF ARGUMENT.

Preliminary Statement.

POINT A.—The Joint Resolution is not applicable to the First Terminal Bonds and coupons. It does not extend to provisions of instruments which give the obligee a right to require payment other than (a) in gold or (b) in a par-

ticular kind of coin or currency of the United States or (c) in an amount in money of the United States measured thereby; nor does it extend to such instruments or "obligagations" as are payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the multiple currency features of the First Terminal Bonds and coupons at bar.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance; the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remain intact.

(3) Payment in guilders is not equivalent to payment in gold.

(4) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right to demand and receive guilders. No public policy inhibits such payment.

(5) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the multiple currency features of instruments payable in multiple currencies.

(6) To hold that multiple currency clauses are condemned by the Joint Resolution would deprive the holders of First Terminal Bonds and coupons of their property without due process of law in violation of the Fifth Amendment.

(7) The "Holyoke" Case.

(8) Decisions of Federal and State Courts construing the Federal statute here involved as affecting multiple currency clauses.

(9) No foreigners are parties to this proceeding or to this appeal, which is between a domestic corporate trustee on the one part, and a debtor in reorganization, its trustee, and its controlling stockholder, on the other part.

(10) Summary Statement regarding applicability of the Joint Resolution to multiple currency clauses.

POINT B.—Accepted Conflict of Laws doctrines are applicable in bankruptcy; the laws of Holland govern the performance of the instruments at bar; and under both American and Dutch law Petitioner's contentions as to performance are correct.

(1) The bankruptcy courts of the United States apply Conflict of Laws doctrines.

(2) Applying accepted Conflict of Laws doctrines to the Petitioner's proof of claim, the law of Holland—the place where the contracts were by their terms to be performed,—governs.

(3) Under both American and Dutch law, Respondents' objections to Petitioner's proof of claim, in so far as based upon the Joint Resolution, are without merit and must fall.

POINT C.—The functional approach to Respondents' interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

POINT D.—Damages should be assessed as of the date of the filing and approval of the petition for reorganization.

III.

ARGUMENT.

Preliminary Statement.

In the courts below, the Respondents raised the following questions which were not passed upon by the Circuit Court of Appeals: (a) Did the corporate mortgage trustee (Petitioner herein) have the right to elect to demand and receive guilders in behalf of the First Terminal bondholders and coupon holders? and (b) Did the right to demand and receive guilders constitute a "fictitious increase" of indebtedness under the Constitution and Revised Statutes of Missouri?

The Circuit Court of Appeals did not pass upon these questions; the petition for the writ of certiorari herein does not raise these questions (although at least one is referred to in Respondents' Joint Brief in opposition thereto, pp. 7-8), and, upon the authority of *Guaranty Trust Company of New York* v. *U. S.*, 304 U. S. 126, they are not discussed in this brief.

If, however, this Court should deem either or both of these questions to be properly before it, *amicus* respectfully requests permission to file a supplemental brief discussing the same.

POINT A.

The Joint Resolution is not applicable to the First Terminal Bonds and coupons. It does not extend to provisions of instruments which give the obligee a right to require payment other than (a) in gold or (b) in a particular kind of coin or currency of the United States or (c) in an amount in money of the United States measured thereby; nor does it extend to such instruments or "obligations" as are payable in money other than that of the United States.

(1) The wording of the Joint Resolution, read together with the definitions it itself contains, shows its inapplicability to the multiple currency features of the First Terminal Bonds and coupons at bar.

It is a general rule that where a statute defines the meaning of words used therein, the statutory definition must prevail, regardless of what other meaning may be attributable to it by other authorities, or even by common understanding (*Fox* v. *Standard Oil Co.*, 294 U. S. 87). The meaning of a statute must first be sought in the language which it employs (*United States* v. *Standard Brewery*, 251 U. S. 210; *Lansdown* v. *Faris*, 66 F. [2d] 939).

The Resolution, the text of which is set forth in Appendix "A" of this brief, is clear and unambiguous. The words "obligation" and "coin and currency" are defined in Section

1(b). By inserting the definitions wherever those words appear, the Resolution properly reads as follows (the definitions being inserted by us in brackets):

> "Every PROVISION contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment **in gold or a particular kind of coin or currency [of the United States]**, or in an amount of money **of the United States measured thereby,**[2] is declared to be against public policy; and **no such provision** shall be contained in or made with respect to **any obligation [payable in money of the United States] hereafter incurred.** Every **obligation [payable in money of the United States], heretofore or hereafter incurred,** whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, **dollar for dollar,** in any coin or currency **[of the United States]** which at the time of payment is legal tender for public and private debts."

The scope of the Resolution is expressly limited to *obligations payable in money of the United States.* The intention so to limit the Resolution appears in the preamble (the definition also being inserted by us in brackets):

> "Whereas the holding of or dealing in **gold** affect the public interest, and are therefore subject to proper regulation and restrictions; and
>
> "Whereas the existing emergency has disclosed that **provisions** of obligations **[payable in money of the United States]** which purport to give the obligee a right to require **payment in gold or a particular kind of coin or currency of the United States,** or in an amount of money **of the United States** measured **thereby,**[2] obstruct the power of the Congress to regulate the value of the money **of the United States,** and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every **dollar,** coined or issued **by the United States,** in the payment of debts. Now, therefore, be it * * *."

[2] *i. e.*, measured by gold or by a particular kind of coin or currency of the United States.

The preamble shows beyond doubt that the statute relates exclusively to coin and currency of the United States and only to those provisions in obligations which are *payable in money of the United States.* **No mention of foreign currencies is made in the Joint Resolution.**

Guilders are not (a) gold or (b) "a particular kind of coin or currency of the United States" or (c) "an amount in money of the United States measured thereby" (i. e., measured by "a particular kind of coin or currency of the United States"); nor was gold, nor any coin or currency of the United States whatsoever, nor any amount in money of the United States measured by a particular kind of coin or currency of the United States, ever demanded; neither were any gold guilders, nor any particular kind of guilders, ever demanded by Petitioner herein.

The preamble of the Joint Resolution refers only to "PROVISIONS" contained in obligations which purport to give the obligee a right to require payment (a) in gold or (b) in a particular kind of coin or currency of the United States, or (c) in an amount of money of the United States measured thereby. It is the "PROVISIONS" which are declared to be inconsistent with the declared policy of the Congress to maintain at all times the equal power of every DOLLAR, coined or issued BY THE UNITED STATES.

In paragraph 1(a) of the Resolution proper the same thought is carried out: It is "every PROVISION" contained in or made with respect to any obligation which purports to give the obligee a right to require payment (a) in gold or (b) in a particular kind of coin or currency, or (c) in an amount in money of the United States measured thereby which "is declared to be against public policy"; and it is stated that "no such PROVISION shall be contained in or made with respect to any obligation hereafter incurred."

Respondents may seek comfort, however, from the next sentence providing that "Every OBLIGATION, heretofore or hereafter incurred, * * * shall be discharged upon payment, DOLLAR for DOLLAR, in any coin or currency which at the time of payment is legal tender for public and private debts."

It is true that the word "obligation" is sometimes used generally to refer to the instrument itself. As used in the Resolution, however, the careful phrasing—"* * * any obligation hereafter *incurred* [clause 1(a), first sentence] and "Every obligation heretofore or hereafter *incurred*" [clause (a), second sentence]—can refer only to the duty and not to the instrument itself. The instrument could not be "incurred."

> "A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the *obligation* of his contract." (Marshall, C. J., in *Sturges* v. *Crowninshield* [4 Wheat. 122, 197, 17 U. S. 120, 196].

This Court in *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, at page 299, also used the word "obligation" precisely as we contend it should be used here when it referred (at p. 299) to the "obligation" to pay in gold coin (see footnote 4, p. 15, *infra*).

Judge Learned Hand summarized this point in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 Fed. (2d) 11, 12 (cert. den.[3] 298 U. S. 655), as follows:

> "It is true that 'a particular kind of coin or currency' means only United States coin or currency, and that 'obligation' means an obligation 'payable in money of the United States'; still it is a plausible, though to us not a persuasive, argument that 'obligation' means the instrument itself and that the resolution therefore covers all instruments which contain a promise to pay money of the United States. That would put these bonds within the resolution as to the promise to pay dollars in gold, as of course they are, but it does not advance the defendant's case a whit as to the other promises. They are within the resolution only in case its terms cover them, which they do not."

[3] It is worthy of note that when certiorari was denied in the *St. Louis Southwestern* case this Court had already decided the *Norman* case and its companion cases and certiorari had already been denied in *Compania de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland*, 269 N. Y. 22, cert. den. 297 U. S. 705.

(2) Only one term of one of the promises (the "gold coin" term) is impossible of performance, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remain intact.

The Joint Resolution struck the words "gold coin", attached to the dollar amount, from the bonds and coupons, the resulting promise to pay lawful money and the separate promises to pay in foreign currencies remaining intact (*Nussbaum, Multiple Currency and Index Clauses*, 84 U. of Pa. L. R. 569, 571, March, 1936, commenting favorably upon the decision of the Circuit Court of Appeals in the *St. Louis Southwestern* case. In the Article Professor Nussbaum treats the subject of multiple currency clauses exhaustively and concludes that the Joint Resolution does not affect such clauses).

The wording of the Resolution itself makes clear that only the dollar "gold coin" clause of the First Terminal Bonds and coupons was intended to be affected—"Every obligation * * * shall be discharged upon payment, **dollar for dollar** * * *," not "dollar for pound," or "dollar for guilder," or "dollar for franc,"—but one dollar of lawful American money for each dollar of a particular kind of American money.

Only that single term of that particular one of the promises in the First Terminal Bonds and coupons is impossible to perform and illegal (i. e., the "gold coin" **term**), the resulting promise to pay lawful money and all the separate remaining promises contained in the bonds and coupons remaining unaffected. (*Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, 299).

In the *Norman* case, this Court stripped the instrument of its "gold clause" term, and left the remainder of the promise intact.[4] Following the same reasoning, and stripping the First Terminal Bonds of the "gold clause" term, they become promises to pay $1,000 lawful money of the

[4] "* * * the Government contends that 'the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin,' *but*, **'as only one term of the promise in the gold clause is impossible to perform and illegal,'** the remainder of the obligation should stand and thus the obligation 'becomes one to pay the stated number of dollars'" (*Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, 299).

United States in America, or, at the choice of the holder, 2,490 guilders in Amsterdam, Holland. Thereupon, upon the holder's election to take guilders in Holland, the bonds must be read as though they had originally been as follows:

> "On ....., 19..., St. Louis Southwestern Railway Company hereby promises to pay to the bearer * * * in Amsterdam, Holland, 2,490 Guilders * * *."

This simple reasoning, precisely following the course taken by this Court in the *Norman* case, clearly indicates that the Joint Resolution was not intended to extinguish, and did not in fact extinguish, the "foreign money" alternatives of the First Terminal Bonds.

The contract was legal when made. The fact that one portion of one (unexercised) alternative subsequently became impossible of performance does not destroy the obligor's duty under the (exercised) lawful alternative (*Restatement, Contracts*, Sec. 344, comment (b); *ibid.*, Sec. 469).

The fact that the holders of First Terminal Bonds, in addition to their right to take guilders, had the right to take dollars cannot be detrimental to them. They cannot be penalized for having secured an additional lawful (but unexercised) right, and this is the effect of Respondents' contentions.

> "As soon as the guilder option is exercised, no dollar claim is left. * * * The right to a definite amount of dollars as existing prior to the exercise of the choice is irrelevant in this situation" (*Nussbaum*, 84 U. of P. L. R., *supra*, at p. 571).

See, also, *Zurich, etc.*, v. *Bethlehem Steel Co.*, at p. 36, *infra*.

The fact that all the alternative promises were contained on one piece of paper does not change the guilder promise into one to pay in gold, or in gold dollars, or in lawful dollars. The contract created as many different obligations as there are different currencies. The media of payment being separated by disjunctives, the obligations were alternative (see *Black's Law Dictionary* [2nd Ed.], p. 843).

Furthermore, the Joint Resolution can in no way affect a contract to be performed in another country in the lawful money of that country. Legislation is presumptively territorial only and is confined to the limits over which the law-making power has jurisdiction. The Joint Resolution could not impair the payment promised to be made in Holland (*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347; *Sandberg* v. *McDonald*, 248 U. S. 185; *Bond* v. *Jay*, 7 Cranch. 350; *Hilton* v. *Guyot*, 159 U. S. 113, 163; *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company, supra;* see also *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, dissent, at p. 38, *infra*).

The Canadian courts were confronted with a question similar to that here presented, when the Canadian dollar depreciated in terms of the United States dollar. Extensive research of American, English, French and Canadian authorities was made by Mr. Justice Maclennan in *La Corporation des Obligations Municipales Limitée* v. *Ville de Montreal-Nord*, 59 Cour Superieure 550 (Quebec). The plaintiff in that case was the holder of coupons of the face value of $213 payable at the holder's option at the Banque d'Hochelaga, in the City of Montreal, or at the office of the National Park Bank, in the City of New York, or at the Clydesdale Bank, Ltd., in the City of London. Plaintiff presented the coupons in New York and demanded American dollars which were then at a premium. Defendant, City of Montreal, refused to pay in any other than the face amount in Canadian currency. On the due date it required $242.82 in Canadian currency to produce $213 in American currency. The Court held that plaintiff was entitled to receive $213 in American currency and, since plaintiff could only recover its damages in Canadian currency, judgment was given for a sum of money which would produce the amount of the coupons in American currency on the due date, to wit: the sum of $242.82 in Canadian currency.

In *Les Commissairs D'Ecole de la Municipalite Scolaire de St. Charles* v. *La Societe des Artisans Canadiens-Francais*, 33 Quebec K. B. 448, suit was brought in Canada on $30 coupons payable in gold, at the holder's option, at the chief

office of the Banque d'Hochelaga, at Montreal, or at the National Park Bank in the City of New York. The plaintiff exercised its option and on the due date presented the coupons in New York where American currency was at a premium of 13½%.

Mr. Justice Martin said (p. 449):

> "* * * The unequivocal promise of the appellants expressed in plain and clear language was to pay the debt in New York and whatever the rate of exchange may have been, and it is a matter of common knowledge during the past few years it has fluctuated, it must pay at the time and place indicated in its obligation, and it does not satisfy that obligation by offering to pay in another manner, and it is rather a novel proposition to seriously contend that it can do so,"

and

> "The proposition is so elementary that one would hardly think it called for extended consideration."

Mr. Justice Greenshield, concurring, said (at p. 451):

> "* * * The rate of exchange which happened to prevail at the time of maturity of the obligation in no way affected the rights or obligations between the parties as contained in the contract. * * * Whether that $30 had a greater purchasing power in a foreign country is, in my opinion, entirely outside the mark and has nothing whatever to do with the contractual obligations of the parties."

In *Jackson* v. *United States*, 60 Ct. of Cl. 599, plaintiff entered into a contract with the United States to erect radio towers in France. The contract provided for payment in dollars. The Government paid plaintiff in depreciated francs. Plaintiff took the francs, and sued for the difference.

The Court found the Government's contention "most singular, why the contractor was not paid as the contract provides." In rendering judgment for plaintiff, the Court stated:

> "By what process of reasoning the meaning, scope and obligation clearly imposed by the provision could be perverted and ignored presents a problem of no easy solution. * * *

> "The contract provided that the contractor was to receive as payment for his undertaking so many *dollars*, and the payment of any less sum would not, and could not, by any lawful means, discharge the obligation or relieve the liability."

By the same token, it is manifest that a sum of dollars which is insufficient to produce for Petitioner the exact number of guilders specified in the First Terminal Bonds and coupons cannot constitute a discharge of the obligation.

The language of Lord Chancellor Eldon in *Cash* v. *Kennion*, 11 Vesey 316, is peculiarly appropriate:

> "I cannot bring myself to doubt that where a man agrees to pay one hundred pounds in London on the first of January he ought to have that sum there upon that day. If he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed."

(3) Payment in guilders is not equivalent to payment in gold.

Respondents themselves concede (see their Joint Brief in opposition to certiorari, pp. 6-7) that if the First Terminal Bonds were payable in guilders only, the Joint Resolution would not apply.[5] As already indicated, the only thing which the Joint Resolution accomplished was to strike the words "gold coin" from the dollar amount (*Norman* v. *Baltimore & Ohio R. R.*, *supra*). Such being the case, and substituting the words "lawful dollars" for "gold dollars" wherever they appear in the First Terminal Bonds and coupons (as accomplished and intended to be accomplished by the Joint Resolution), it is apparent that Respondents, on their own view of the case, must fail in their contention that the words "gold coin," attached to the dollar amount, permit the Debtor to pay that dollar amount in lieu of the number of guilders set forth in the First Terminal Bonds and coupons, even after the holder exercised his choice to take guilders.

[5] After the election to take guilders, the promise at bar did in fact become one to pay guilders only.

for the simple reason that payment in guilders is not equivalent to payment in gold.

At the time when the First Terminal Bonds were issued or sold and at all pertinent times, the guilder was and is the monetary unit of Holland, and the Nederlandsche Bank was and is entitled to act as its circulation bank (R. 165). During all pertinent times the Nederlandsche Bank had the exclusive right to issue notes, and by Article I of the Law of July 18, 1904, Section 189, it is provided that so long as the Nederlandsche Bank is entitled to act as circulation bank, its notes have the quality of legal tender and lawful money; and its notes now are legal tender, except as to payments to be made by the Nederlandsche Bank itself (R. 165). The currency units of The Netherlands are provided for by the monetary laws thereof (R. 165 *et seq.*). In addition to the notes of the Nederlandsche Bank, certain silver coins have the quality of legal tender "up to any amount" (R. 165); there is not even a gold guilder (R. 165-166); and an important gold coin, the gold dukaat, is expressly provided to be "without the quality of legal tender" (R. 166). In fact, also, Holland has suspended gold exports (R. 167).

The correct view was expressed by Judge Learned Hand, speaking for the Circuit Court of Appeals for the Second Circuit in the *St. Louis Southwestern* case, at pages 11-12, as follows:

> "As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. **If he chose any of the foreign currencies he could not get gold;** he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible,' not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved pro tanto, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. **If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."**

And again at page 12:

> "* * * foreign money[6] is a commodity like wheat or shoes, and lawful to buy unlike gold."

To the same effect, see *Restatement, Conflict of Laws*, Sec. 423, comment (a).

The situation in the United States with respect to the export of gold by the Federal Reserve Bank is identical with that in Holland with respect to the export of gold by the Nederlandsche Bank.

The present lawful dollar of the United States is measured in gold, 15-5/21 grains nine-tenths fine (Presidential Proclamation of January 31, 1934) although not redeemable in gold.

Under the Gold Reserve Act of 1934 and the Provisional Regulations issued thereunder (Art. IV, Secs. 28 and 29), gold may be held, transported, imported, exported, or earmarked, or held in custody for foreign or domestic account by Federal Reserve banks for the purpose, among other things, of settling international balances.

If the argument advanced by Respondents (Respondents' Joint Brief in opposition to petition for writ of certiorari, Points I and IV) prevails, then, by the same token, payment in present lawful money of the United States (Federal Reserve notes) must likewise be regarded as equivalent to payment in gold and in violation of the Joint Resolution. Of course, Respondents will not seriously argue that payment in present lawful Federal Reserve notes would constitute payment in gold or its "equivalent." However, their argument, followed to its logical conclusion, would relieve the Debtor from any payment whatever.

As a matter of fact, neither Petitioner nor the bondholders could have demanded gold guilders, or any particular kind of guilders, nor could they have obtained them even if demanded. As heretofore stated, also (p. 13, *supra*), neither gold, nor gold guilders, nor any particular kind of guilders were demanded. Payment in any kind of lawful guilders (i. e., notes of the Nederlandsche Bank, see pp. 19-20, *supra*; R. 165) would have lawfully satisfied the demand.

---

[6] At par, guilders.

The fact that guilders are not the equivalent of gold is exemplified even by the brief to the Appellate Division for the successful defendant Bethlehem Steel Company in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634,[7] where the admission is made:

> "By the terms of these bonds, **dollars only were made payable in gold coin.** There was no gold provision for sterling and guilders" (at p. 40).
>
> * * * * * *
>
> "The Corporation, on the other hand, was protected by the circumstance that it did its own business in the United States and derived its own income in dollars, so that **the only gold obligation in the bonds was one in respect of its own currency,** of which it would always have an adequate supply" (at p. 41).

And Southern Pacific Company (one of the Respondents at bar) made the following admission at page 77 of its brief to the Circuit Court of Appeals (9th) in the *McAdoo* case (cited and discussed at p. 39 *et seq.*, *infra*), commenting on the coupons from these very First Terminal Bonds:

> **"The promise was no more to pay in United States money than it was to pay in German marks, etc."**

No court has ever held that payment of guilders in Holland was simply and plainly abolished by the Joint Resolution. The decisions refusing recovery for guilder value were all based upon the fact that the same instrument contained a separate, alternative, distinct (and unexercised) right to the holder of the instrument to take "gold" or "gold coin" dollars.

Inasmuch as payment *simpliciter* in guilders is admittedly not interdicted (see Respondents' Joint Brief in opposition to certiorari, p. 7), then, by the same token, a guilder option,

---

[7] All such decisions except the one here under review were of lower and intermediate appellate state courts in New York, and have all been overruled by the *Zurich* and *Anglo* cases against Bethlehem Steel Company, decided by the New York Court of Appeals January 11, 1939 (see p. 34 *et seq.*, *infra*).

the exercise of which results in an identical simple obligation on Debtor's part to pay the identical guilders, must likewise be equally free from taint.

The situation is well summed up by Judge Learned Hand in the *St. Louis Southwestern* case (at p. 12):

> "Since, as we have seen, the promise to pay guilders did not 'purport * * * to require payment in gold,' the resolution does not hit it." (Asterisks not ours.)

Respondents' real grievance is that performance costs the Debtor more than it is willing to pay. Such a defense is without merit (*Norcross* v. *Wills*, 198 N. Y. 336, 341; *Williston on Contracts*, Vol. III, Sec. 1963).

(4) Neither the spirit nor the intent of the Joint Resolution affect or were intended to affect the right to demand and receive guilders. No public policy inhibits such payment.

> "There is in the Congressional data not the slightest suggestion that Congress had considered an impairment of multiple currency clauses. Those clauses are not mentioned in the Congressional material, either directly or indirectly. * * * Thus, there is at least no documentary evidence for the assertion, which certainly requires proof, that multiple currency clauses were within the intent and spirit of the Joint Resolution." (*Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 573.)

"However, diversity, and fundamental diversity, between gold clauses and multiple currency clauses appears when the situation is regarded from an economic and political standpoint" (*Nussbaum*, 84 U. of Pa. L. R., *supra*, p. 575).

In the case of multiple currency clauses, there is no justification to deny or invalidate the liability incurred. "Those obligations have always been undertaken with a clear understanding of their meaning and with no pressure of an actually inescapable custom.[8] It cannot even be alleged that the rate of exchange risk incurred was not considered by the borrowers. For it is remarkable that in most cases the multiple currency clause was conceded only as to interest,

[8] Such as prevailed with respect to gold coin clauses (discussed at p. 576).

not as to principal. Such a limitation will not be found in any gold bond. That the Joint Resolution cannot be regarded as having simply and plainly abolished the multiple currency clauses is clearly recognized both by the debtors invoking the Resolution and by the New York court"—referring to the now overruled decision in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co., infra,* p. 37—(*Nussbaum,* 84 U. of Pa. L. R., *supra,* pp. 576-577).

Manifestly, had Congress intended to legislate with respect to multiple currencies, it would have included them in the definitions contained in the Joint Resolution. The omission is most significant, since there has been no hesitancy on the part of Congress to legislate specifically with respect to any matters deemed by it to be against public policy.

> "Equally, we should have no warrant in supposing that when the obligation was to pay foreign money, it was any nearer to the putative purposes of Congress than if it was to do anything else" (*St. Louis Southwestern* case, at p. 12).

That multiple currency promises were never intended to come within the condemnation of the Joint Resolution is further evident from Executive Order No. 6560 promulgated January 15, 1934, by the President by virtue of Section 5(b) of the Act of October 6, 1917 (40 Stat. 411), as amended by Section 2 of the Act of March 9, 1933, prescribing regulations for the investigation, regulation and prohibition of transactions in foreign exchange and transfers of credit.

Certain transactions were prohibited except under license, provided, however, that

> "foreign exchange transactions and transfers of credit may be carried out *without a license* for (a) normal commercial or business requirements * * * (c) the fulfillment of legally enforceable obligations incurred prior to March 9, 1933."

The First Terminal Bonds and coupons were issued in 1912. Servicing of a funded debt is surely a "normal commercial or business requirement." Payment of the First Terminal Bonds and coupons even falls within the express permission of these regulations.

Guilders are legal tender of The Netherlands and an obligation payable in that country in guilders can be discharged only by payment of Dutch currency, or of damages in this country in lawful American dollars.

> "The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed." (*Restatement, Conflict of Laws*, Sec. 364.)

The law of the place of performance determines the manner of performance, as well as the excuse for non-performance (*Restatement, Conflict of Laws*, Sec. 358(a) and (e): *Andrews* v. *Pond*, 12 Peters 65, 77).

Articles 1308, 1309, 1311, 1312 and 1313 of the Dutch Civil Code provide that in the case of alternative obligations, where the choice has been left to the creditor, if one of the two things has perished or can no longer be delivered, the creditor is entitled to the other.

Such, also, is our own law:

> "Where a contract provides that one of two alternatives shall be performed by the promisor, the fact that one alternative is, or becomes, impossible does not excuse the promisor from performing that which remains possible * * *" (*Williston on Contracts*, Sec. 1961).

Using the words of Judge Hand in the *St. Louis Southwestern* case (at p. 13),

> "Congress either forbad the enforcement of such promises, or it did not. We will not try to recast it altogether, excepting alien obligees though its language covers them equally with citizens. There is a limit to the power of courts to mould the language of a statute in the interest of even the clearest immanent purpose; and we are not here certain of the existence of such a purpose."

Federal and State courts have both permitted recovery for the full dollar amount of dollar instruments against contentions that by the laws and currency restrictions of the foreign

countries of which the defendants were citizens such payments might not lawfully be made and that such payments imposed hardship upon the debtors (*Central Hanover Bank & Trust Co.* v. *Siemens & Halske Aktiengesellschaft et al.*, 15 F. Supp. 927 [Dist. Ct., S. D. N. Y.], aff'd on opinion below 84 F. [2d] 993 [C. C. A. 2d], cert. den. 299 U. S. 585; *Perry* v. *Norddeutscher Lloyd* [*Bremen*] [*North German Lloyd*], 150 Misc. 73 [N. Y.]; *Glynn* v. *United Steel Works Corporation*, 160 Misc. 405 [N. Y.]; *Marks* v. *United Steel Works Corporation*, 160 Misc. 678 [N. Y.]; *Sheppard* v. *Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft*, N. Y. Law Journal, Mar. 14, 1934, p. 1232 [Collins, J.] [not elsewhere reported]; *Lann* v. *United Steel Works Corporation*, 166 Misc. 465 [N. Y.]; *Goodman* v. *Deutsche Atlantische &c.* and *Douglis* v. *Same*, 166 Misc. 509 [N. Y.]; *Mayer* v. *Hungarian Commercial*, No. L. 7424, U. S. D. C., E. D. N. Y., decided July 7, 1934—Galston, J. [not elsewhere reported]; *Pan-American Securities Corporation* v. *Fried. Krupp*, 6 N. Y. Supp. [2d] 993).

Respondents have referred disparagingly to the fact that First Terminal bondholders might make a speculative profit if the claim for guilders were to be allowed (Respondents' Joint Brief in opposition to petition for writ of certiorari, p. 19). In answer, we can use no better language than that used by Mr. Justice Steinbrink in *Pan-American Securities Corporation* v. *Fried. Krupp*, cited *supra*. The learned Justice had before him an instrument issued by a German corporation payable in dollars in America. The German Devisen Laws were pleaded as a defense, and defendant also urged that plaintiff intended to make a speculative profit by the purchase of the securities.

Finding for the plaintiff upon a motion for summary judgment, the Court held, among other things, that the alleged fact that the plaintiff seeks to make a speculative profit is no concern of the court, "for the answer to such arguments is that if the plaintiff seeks to make a huge speculative profit, so, too, *the defendant seeks to make a larger profit by compelling the plaintiff to accept payment in a depreciated currency.*"

Public policy also permits recovery in the United States upon instruments, payment of which is lawful by the law of the place of performance. There is no public policy restricting or prohibiting the payment of guilders, either in the United States or abroad.

(5) No dislocation of domestic economy is involved in holding that the Joint Resolution does not apply to the multiple currency features of instruments payable in multiple currencies.

All parties to the instant litigation admit that no dislocation of domestic economy is involved by sustaining the validity of the multiple currency clauses.

Thus Petitioner, at page 29 of its brief in support of its petition for a writ of certiorari, makes the following correct statement:

> "Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936).[1] "

And Respondents, at page 17 of their Joint Brief in opposition to petition for writ of certiorari, make the following statement:

> "The importance of the precise question at issue, viz., the application of the Joint Resolution to United States money contracts containing foreign money options, *has become of somewhat lesser importance in the last few years.* A number of bond issues having such options have been redeemed recently, *and there are only two uncalled issues*, in addition to the St. Louis

[1] According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee*, v. *Anglo-Continentale Treuhand, A. G.*, 298 U. S. 655, only $90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause."

> Southwestern Railway Company issue, which are payable in money of the United States, or optionally in a foreign money now at a premium, viz., an issue of Southern Pacific Company and an issue assumed by Niagara, Lockport and Ontario Power Co. Also some bonds of this character of the Bethlehem Steel Company, which have been called for payment, are still outstanding. Moreover, the foreign moneys in which these issues are optionally payable, Dutch guilders and Swiss francs, now command a smaller premium than they did several years ago."

In the *Norman* case this Court did not purport to pass upon multiple currency instruments, payable abroad in a foreign monetary unit. Nowhere in the decision is there any indication that the Court entertained the view that the Joint Resolution condemned multiple currency payments—multiple currency clauses were not before the Court for construction. In the argument for the Government, repeated references are made only to the "gold clause" (i. e., at pp. 273-274-275).

The Southern Pacific issue referred to by Respondents as containing multiple currency clauses, amounts to a total, as expressed in dollars, of less than $25,000,000, out of a total funded debt of the Southern Pacific system of upwards of $700,000,000 (Moody's Manual of Railroads, 1938) and the bonds of the Niagara, Lockport and Ontario Power Company containing multiple currency clauses amount to a total, as expressed in dollars, of $2,605,000, out of a total funded debt of $23,816,500 (Moody's Manual of Public Utilities, 1938).

This Court said in the *Norman* case (at p. 312):

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence * * *."

Therefore, Mr. Chief Justice Hughes' statement in the *Norman* case as to the "dislocation of domestic economy" is not applicable here.

Inasmuch as these multiple currency clauses apply "to a very limited number of contracts and security issues," there exists no economic justification for holding that the Joint Resolution condemns or prohibits multiple currency clauses.

(6) To hold that multiple currency clauses are condemned by the Joint Resolution would deprive the holders of First Terminal Bonds and coupons of their property without due process of law in violation of the Fifth Amendment.

The Mortgage Indenture (R. 17 *et seq.*) conveys to the corporate mortgage trustees various specific property, as therein described, as security for the payment of the First Terminal Bonds and coupons. The mortgage is dated January 1, 1912, more than twenty-one years prior to the passage of the Joint Resolution.

It must be remembered that this Court is here called upon to construe the Joint Resolution in a bankruptcy proceeding.

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment" (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, at p. 589).

Under the Bankruptcy Act, though Congress may discharge the debtor's personal obligation, it cannot take, for the benefit of the debtor, rights in specific property acquired prior to the enactment of amendatory Section 77 of the Bankruptcy Act. As was said by this Court in the *Louisville Joint Stock Land Bank* case, *supra*, at page 580:

> "This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage."

And again (at p. 602):

> "* * * private property shall not be thus taken even for a wholly public use without just compensation."

The "taking" here attempted by Respondents is for a private and not for a public use. To destroy the bondholders' right to demand and receive guilders in Amsterdam, Hol-

land, or damages for Debtor's failure to pay the same, would operate to take their "rights in specific property which are of substantial value" (*id.*, at p. 601) from one person and give them to another, in violation of the Fifth Amendment of the Constitution.

One of the Respondents, Southern Pacific Company, has stated that it appears herein as a creditor (*Joint Brief of Respondents in opposition to certiorari*, p. 24)—presumably to indicate a disinterested position. It is a matter of record in the bankruptcy court and in the Interstate Commerce Commission, that the Southern Pacific Company is the owner of 87% of the capital stock of the Debtor (see, also, Moody's Manual of Railroads, 1938), and any impairment of the rights of the holders of First Terminal Bonds, or diminution of their claims, would have the direct result of enhancing the value of the interest of the stockholders in the property of the Debtor at the expense of the First Terminal bondholders. The Joint Resolution should, if possible, be construed so as to avoid the unconstitutional result of confiscating the property of the First Terminal bondholders principally for the benefit of one of the Respondents. To this end, that construction thereof which will save the Resolution should be adopted (*National Labor Relations Board* v. *Jones & Laughlin, etc.*, 301 U. S. 1).

As stated by Mr. Justice Holmes in *United States* v. *Moy*, 241 U. S. 394, 401 (1916):

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

See also *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407 (1909); *Horey* v. *De Long Hook & Eye Co.*, 211 N. Y. 420, 429 (1914).

See further *Hare, American Constitutional Law* (1889), Vol. II, pp. 1233-1239, from which we quote as follows:

> "It results from these considerations that the power of Congress over the currency is supreme. It has no limit, because none is set to it in the Constitution. * * *

"The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat * * * and submitting to the uncertainty, delay, and other inconveniences inseparable from such a mode of contracting; among which may be mentioned * * * the necessity for calling a jury to assess the damages. * * * If the question of value is left to the government by bargaining for money, * * * the parties must submit * * *. This will be true, even when a particular kind of money is contracted or, so long as the contract is for lawful money of the country, because the limitation will be rejected as inconsistent with the general design of the contract. That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin, * * * (citing *Shoenberger* v. *Watts*, 5 Phila. 51, 56 [1882])."

Thus the constitutional powers of Congress cannot be expanded to condemn payment of guilders abroad nor to deprive the holders of these instruments of their express contract and property rights in the manner contended for by respondents.

If, however, the filing and approval of the petition in reorganization be deemed to "freeze" the rights of the First Terminal bondholders, and to deprive them of the right of election, due compensation must be given to them for such deprivation (*Central Trust Company of Illinois* v. *Chicago Auditorium Association*, 240 U. S. 581; *Maynard* v. *Elliott*, 283 U. S. 273; *Dunlop* v. *Baker*, 239 Fed. 193 [C. C. A. 4th], cert. den. 242 U. S. 650; *Security-First National Bank* v. *Pindge Land & Navigation Co.*, 85 Fed. [2d] 557 [C. C. A. 9th]), and such compensation is represented by the value of the guilder on December 12, 1935 (see also Point D, *infra*).

(7) The "Holyoke" Case.

Respondents will without doubt urge upon this Court (as they did at page 9 of their Joint Brief in opposition to the petition for writ of certiorari herein) that *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324 (hereinafter referred to as the "*Holyoke* case"), is persuasive of the issues here presented.

An examination of that case shows at once that *no question of multiple currencies was even remotely involved.*

Certain leases were executed by the Water Power Company to the Paper Company.

> "By concession the following form has been accepted as typical: the grantee shall yield and pay unto the grantor as rent 'a quantity of gold which shall be equal in amount to Fifteen Hundred ($1500) Dollars of the gold coin of the United States of the standard of weight and fineness of the year 1894, or the equivalent of this commodity in United States currency'" (p. 333).

Applying the Joint Resolution, this Court held (p. 333) that the obligation was for the payment of money and not for the delivery of gold as upon the sale of a commodity, and that (p. 337) the contract, being for the payment of **money of the United States** measurable in gold, "is within the letter of the Joint Resolution."

Our contentions at bar are entirely consistent with the decision thus reached. Applying the definitions appearing in the Joint Resolution itself, it appears that one alternative of the contract in the *Holyoke* case was for the payment of a quantity of "gold" which should equal a specific amount of "a particular kind of coin or currency of the United States," and therefore came within the specific condemnation of the Joint Resolution. The other alternative provided for in the *Holyoke* lease was for the payment of "a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby," and therefore also quite properly came within the condemnation of the Resolution.

This Court's approach to the problem in the *Holyoke* case is set forth at page 340 of the opinion:

> "If the currency[9] to be paid by the lessee is to be the equivalent of gold, and if the gold is to be the equivalent of a stated number of gold dollars of a particular weight and fineness, then *the covenant to pay the currency*[9] is tantamount to a covenant to pay the dollars, and dollars of the stated standard."

It seems apparent by the above quotation from the *Holyoke* decision that this Court condemned only that *"covenant to pay the currency"*[9] (of the United States) which was equivalent to the "gold," or the "particular kind" of currency, referred to in the lease. This Court even went so far as to indicate that if the covenant had even been one to pay *gold as a commodity* (if the recipient were engaged in an art requiring gold) it would not have been condemned.

In fact, as indicating that this Court had no intention of even remotely touching the multiple currency question, as to which it had denied certiorari in the *St. Louis Southwestern* case only a short time previously, we quote the following from the opinion at pages 335-336:

> "Long ago it was said by a distinguished member of this court, commenting upon a different statute, but one analogous in purpose: 'If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply * * *.' (*The Legal Tender Cases*, 12 Wall. 457, 566.)"

Paraphrasing the words of Mr. Justice Cardozo, the contract at bar is for "a specific commodity or substance" (Dutch guilders) and the Joint Resolution does not apply.

In exact line with the reasoning in the *Norman* case—to the effect that *only one term* of the promise was impossible to perform and illegal (i. e., the "gold coin" *term*), all the remaining promises remaining unaffected,—this Court, in reaching its conclusions in the *Holyoke* case, stripped the instrument of its "gold" and "gold coin" TERMS, the remain-

---

[9] Under the definitions in paragraph 1(b) of the Joint Resolution, the "currency" to which the Court refers must be deemed to be "coin or currency *of the United States.*"

der of the instrument remaining intact and unaffected, and becoming one to pay the stated number of dollars.

In exact compliance with the Joint Resolution, also, this Court in the *Holyoke* case ordered that the obligation be discharged "DOLLAR FOR DOLLAR"—a dollar of a "particular kind" for a present lawful dollar—specifically as provided for in the Joint Resolution.

Accordingly, on analysis, not only is the *Holyoke* case incapable of the application to the case at bar for which Respondents contend, but, properly read, and particularly in the light of Judge Hand's opinion in the *St. Louis Southwestern* case, it actually, by indirection, supports our position that the Joint Resolution does not apply to multiple currency clauses.

(8) Decisions of Federal and State Courts construing the Federal statute here involved as affecting multiple currency clauses.

The application of the Joint Resolution to multiple currency clauses has been the subject of litigation in four jurisdictions, viz., the State courts of New York, the Federal courts in California, the Federal courts in New York, and the Federal courts in Missouri (the latter in the instant case, and in certain other claims on the part of individual bondholders, referred to in subdivisions (a) and (b) on page 2, *supra*).

Save and except in the instant case, the governing decisions in all jurisdictions sustain the proposition that the Joint Resolution is not applicable to the multiple currency features of the promises, and does not prohibit or bar the payment abroad of the specific number of foreign monetary units specified in the instruments, even though, in the same piece of paper, there is contained an unexercised option to take gold dollars.

(a) The law in the State of New York has been settled as recently as January 11, 1939, by the opinion of the Court of Appeals of that State, to the effect that the Joint Resolution is not applicable to multiple currency clauses (*Zurich Gen-*

eral Accident & Liability Insurance Co. v. *Bethlehem Steel Co.*, 164 Misc. 498, aff'd 254 App. Div. 839, reversed ... N.Y. ... [1939]; *and Anglo-Continentale Treuhand, A. G.* v. *Bethlehem Steel Co.*, 6 N. Y. Supp. [2d] 334, modified, and affirmed as modified, 254 App. Div. 844, judgment of Appellate Division reversed and that of Special Term affirmed, with costs, ... N. Y. ... [1939]). Petitions to this Court for the granting of writs of certiorari have been presented by the losing defendants in both said cases.

The *Zurich* case involved multiple currency coupons from an issue of multiple currency bonds issued by Lackawanna Steel Company, predecessor of Bethlehem Steel Company, similar to those at bar, i. e., payable in gold dollars in the United States of America, or in a specified number of pounds sterling in England, or in a specified number of guilders in Holland, or in a specified number of marks in Germany, or in a specified number of francs in France, Belgium or Switzerland.

The plaintiff in that case, a foreign corporation, demanded payment in Switzerland of the number of Swiss francs set forth in the coupons, but payment was refused. The court at Special Term granted summary judgment for the face amount of the *dollars* set forth in the coupons, and dismissed the complaint as to the balance; the Appellate Division affirmed (two Justices dissenting) and, as stated above, the Court of Appeals reversed the Appellate Division and the lower court, and granted plaintiffs' motion for summary judgment for the full value of the Swiss francs sued upon.

The following appears in the majority opinion:

> "The question is whether, on the facts of this case, the Joint Resolution is applicable to this obligation to pay the foreign currency to a foreign corporation in a foreign country. The courts below have held that it is. We are convinced of the correctness of the contrary result flowing from the decision of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.* (81 Fed. 2d, 11,—1936), wherein the facts were the same [as] at bar except that payment was made in guilders at Amsterdam instead of francs at Zurich. * * *

> "On the facts of this case, the obligation was not payable in 'money of the United States' but in foreign currency and therefore the Joint Resolution is not applicable. **The obligation might have become payable at New York in United States money, but the fact is that it did become payable in Switzerland in Swiss currency.**"

In *Anglo-Continentale Treuhand* v. *Bethlehem Steel Co.*, argued and decided concurrently with the *Zurich* case, the defendant's answer had been stricken and summary judgment had been rendered at Special Term for the full amount sued for, based on defendant's refusal to pay in Amsterdam the specified number of guilders set forth in multiple currency coupons detached from multiple currency bonds of Bethlehem Steel Company, similar to the Lackawanna Steel Company bonds and coupons involved in the *Zurich* case. The Appellate Division modified the judgment, by reducing the same to the face amount of the *dollars* set forth in the coupons, though allowing interest from the date of presentation, and, as so modified, affirmed the judgment (a somewhat anomalous holding, the effect of which was to compel plaintiffs to accept the face amount of the *dollars* in the United States set forth in the coupons, but to compel defendant to pay interest for its refusal to pay the guilders demanded in Holland by the plaintiffs). The Court of Appeals reversed the judgment of the Appellate Division and affirmed the judgment of the Special Term, with costs to the plaintiffs.

The following appears in the *per curiam* opinion:

> "This action is the same in principle as the *Zurich Insurance Company* case decided herewith. In the present litigation the trial justice granted plaintiffs' motion for summary judgment for the amount demanded in the complaint but the Appellate Division modified by reducing the judgment to amounts to conform with the theory that the Joint Resolution of Congress required payment of these coupons in foreign currency in a foreign country based upon the value of United States dollars as depreciated. The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs, etc."

The law in New York thus having been settled by the Court of Appeals, all decisions of the Appellate Division or of the Supreme Court, from which contrary inferences might be drawn, may thereby be deemed to be overruled.[10]

The Court of Appeals opinions can now be taken as adopting Mr. Justice Merrell's dissent in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634. In that case the majority held that a *domestic*[11] trustee could not recover the value of guilders upon multiple currency coupons similar to those at bar but was limited in its recovery to the face dollar amount of the coupons.

Mr. Justice Merrell vigorously dissented (see pp. 640-641 of 244 App. Div.), stating, among other things:

> "The resolution is carefully limited to obligations 'payable in money of the United States,' and payable in 'a particular kind of coin or currency of the United States.' There is no intention on the part of the Congress to extend the resolution to obligations payable in foreign countries in a foreign currency. The absence of any such intention is clearly shown by the preamble of the resolution, which stated as follows:
>
> * * * * * * *

---

[10] *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634; *Anglo-Continentale Treuhand, A. G.* v. *Southern Pacific Co.*, 165 Misc. 562 (N. Y.), affirmed without opinion 251 App. Div. 803, motion for reargument or leave to appeal to Court of Appeals denied 251 App. Div. 885; *Hydropress Handels, A. G.* v. *Lackawanna Steel Co.*, New York Law Journal, May 7, 1938, page 2221; also the decision of the Appellate Division and of Mr. Justice Rosenman in the *Zurich* case and of the Appellate Division in the *Anglo* case, both discussed at page 35 *et seq.* It is worthy of note that in all of the aforesaid opinions (except in the *Zurich* case below) language appears indicating that foreigners have the right to recover foreign moneys abroad on multiple currency clauses.

Lower court decisions in New York State which now remain in harmony with the decisions of the Court of Appeals, and which may be regarded as having validity, are: *Mondiale Handels-und Verwaltungs and another* v. *Bethlehem Iron & Steel Corporation*; *Nederlandsche Middenstandsbank N. V. and others* v. *Bethlehem Steel Co.*; *Zurich General Accident & Liability Ins. Co.* v. *Bethlehem Iron & Steel Co.* (all decided by Mr. Justice Hofstadter and all reported in New York Law Journal, June 13, 1936).

The judgments in all three last-mentioned cases were paid in full with interest, and they, together with the *St. Louis Southwestern* case, constitute the only final, unappealable holdings on the question—all to the effect that the Joint Resolution does not affect the multiple currency features of the instruments sued upon.

[11] According to the majority opinion (p. 636), it was not contended that the holders of the coupons, who were subjects of England and Holland, respectively, were governed by the terms of the Joint Resolution.

"The resolution itself is clear and unambiguous and should not be extended by interpretation or construction to include any reference to obligations other than those which are payable in money of the United States. Under well-recognized constitutional limitations the Congress had no power to extend the scope of the resolution so as to give it extraterritorial effect. * * * Neither the power of the Congress to regulate the value of the money of the United States nor 'the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts,' has any application to the contract here involved, which contract provided expressly for the payment of the coupons in guilders at Amsterdam, Holland, in case the holder exercised its option to present the same for payment there. In adopting this resolution the Congress recognized that it could not make this law effective in a foreign country. The Congress must have recognized that its declaration as to the American public policy had nothing to do with contracts to be performed abroad."

(b) *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Co.*, 81 F. (2d) 11, cert. den. 298 U. S. 655, is the decision referred to and relied upon by the Court of Appeals in settling the law in New York to the effect that the Joint Resolution does not apply to multiple currency clauses.

In that case, Judge Learned Hand, writing for a unanimous Circuit Court of Appeals for the Second Circuit, in an action **upon coupons detached from bonds of the very issue now before this Court,** expressly rejected the reasoning of the majority of the Appellate Division in the *City Bank Farmers Trust Company* case (*infra*), and adopted the reasoning of Judge Lindley in *McAdoo* v. *Southern Pacific Co.* (*infra*) and the reasoning of the dissenting opinion of Mr. Justice Merrell in the *City Bank* case, using the following language:

"Judge Lindley in *McAdoo* v. *Southern Pac. Co.* (D. C.), 10 F. Supp. 953, took our view; the Appellate Division of the Supreme Court of New York by a majority of four to one decided otherwise. *City*

> *Bank Farmers Trust Co.* v. *Bethlehem Steel Co.*, 244 App. Div. 634, 280 N. Y. 494. We are not persuaded by the reasoning of the majority."

Other language from this well-reasoned opinion is elsewhere quoted in this brief.

The judgment in the *St. Louis Southwestern* case was paid in full with interest, and up to this time this is the only case which has been litigated to the ultimate court to which it could possibly go.

(c) As indicated, Judge Hand's excellent opinion, cited with approval *McAdoo* v. *Southern Pacific Co.*, 10 Fed. Supp. 953 (N. D., Cal., S. D.; reversed, solely on jurisdictional grounds, by the Circuit Court of Appeals, 9th, and remanded because the amount involved in the suit was less than $3,000, 82 F. [2d] 121). That was a suit for a declaratory judgment by a *domestic* upon coupons similar to those at bar, issued by one of the companies in Respondent Southern Pacific's railroad system. Judge Lindley, in a convincing opinion, held that even a domestic was entitled to recover the value of foreign moneys if payment in such foreign moneys was selected by him.

In referring to *Norman* v. *Baltimore & Ohio R. Co.*, *supra*, Judge Lindley said (at p. 953):

> "In the Gold Clause cases, *Norman* v. *Baltimore & O. R. Co.*, 294 U. S. 240, * * * the court was dealing with legislation that expressly forbade contracts payable in gold coins of the United States. There, the court said: 'The Congress has enacted an express interdiction' [citations]. The question with which the court here is primarily concerned is whether that interdiction expressly or impliedly includes contracts payable in guilders of the Netherlands or francs of Switzerland."

and, in discussing the Joint Resolution, said at page 954:

> "The unambiguous provision of the resolution then is to declare unlawful clauses requiring payment in gold of any obligation 'payable in money of the United States,' in 'coin or currency of the United States.' The act by its own language carefully limits its force

> to 'obligations payable in money of the United States,' and purports to deal only with 'coin or currency of the United States.' The bar of illegality, by its own terms, is defined and limited in effect. Congress was dealing with contracts calling for payment in gold coin of the United States; not with contracts payable in money of foreign countries. The preamble of the resolution so indicates. If we give full force and effect to the unambiguous language employed, we are unable to point out any words that disclose any intent to extend the prohibition further than that language clearly indicates. Consequently, the rights and liabilities of the parties in the contracts under consideration, not being within the legislation, are the same as if the resolution had never been adopted."

(e) In the face of Judge Lindley's decision in the *McAdoo* case, and of the opinion in the *St. Louis Southwestern* case, the Circuit Court of Appeals in the instant case (*Guaranty Trust Co.* v. *Henwood*, 98 F. [2d] 160 [C. C. A. 8th], cert. granted — U. S. —) placed a different construction upon the Joint Resolution, apparently—we believe erroneously—basing its decision (in part at least) upon the circumstance that this railroad obligor is in reorganization.

Amicus respectfully submits that the reasoning of the Court below was in error, and that the reasoning of Judge Hand in the *St. Louis Southwestern* case and of the New York Court of Appeals in the *Zurich* and *Anglo* cases, truly and correctly construes the Joint Resolution so far as concerns its impact upon the multiple currency clauses contained in the First Terminal Bonds and coupons.

It may be noted, also, that the Court of Appeals, in the *Zurich* and *Anglo* cases, had before it the then most recent decision (that of Judge Stone in the instant case), as well as all the preceding decisions in its own and the other jurisdictions in which this question had come up for decision; nevertheless, it chose what we believe to be the correct construction, viz.: that found in the dissenting opinion of Mr. Justice Merrell, in the opinions of Judge Lindley, Judge

Hand and Mr. Justice Hofstadter, and in the opinion of the dissenting Justices in the Appellate Division in the *Zurich* and *Anglo* cases; and it is the construction of the Joint Resolution, as applied to multiple currency clauses, thus recently re-enunciated by the New York Court of Appeals which we now urge upon this Court.

It is to be expressly noted, also, that in the *St. Louis Southwestern* case plaintiffs expressly conceded (see pp. 35-36 of appellees' brief in the Circuit Court of Appeals; p. 3 of respondent's brief in opposition to petition for writ of certiorari) that the instruments there sued upon were acquired after the passage of the Joint Resolution, but judgment was nevertheless granted to the plaintiffs. The same express concession was made by the plaintiffs in the *Anglo* case recently decided in their favor by the New York Court of Appeals (see p. 8 of their brief in that Court).

(9) No foreigners are parties to this proceeding or to this appeal, which is between a domestic corporate trustee on the one part, and a debtor in reorganization, its trustee, and its controlling stockholder, on the other part.

Amicus respectfully calls the attention of this Court to the intimations in various decisions (see footnote 10, p. 37, *supra*) that foreigners may be entitled to recover the value of foreign monetary units, whether or not domestics may be entitled to do so. The clients represented by *amicus* are all foreigners. The mere circumstance that some First Terminal bondholders are aliens does not deprive them of their constitutional rights. *Wong Wing* v. *United States*, 163 U. S. 228; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481.

If the issues as framed upon this appeal are decided in favor of the contentions of Petitioner, the rights of foreign holders of First Terminal Bonds and coupons to demand and receive foreign monetary units will be sustained; on the other hand, if Question 1 (p. 8, *supra*) is decided by this Court against the Petitioner, the rights of such foreign holders to demand and receive foreign monetary units will remain undetermined by this Court.

Amicus respectfully further calls the attention of this Court to the fact that no bondholders who have filed independent proofs of claim herein are parties hereto, so that any rights such bondholders may have in their individual capacity —as, for instance, a claim of *res adjudicata* by Anglo-Continentale Treuhand, A. G.—will likewise remain undetermined upon this appeal.

(10) Summary Statement regarding applicability of the Joint Resolution to multiple currency clauses.

The Joint Resolution not being applicable, the question, therefore, resolves itself into a simple problem in contracts.

> "When a contract involves a promise to do one thing or another at the option of either party the place of performance is undetermined until the option is exercised, and it then becomes the place of performing the promise which is chosen by the party having the option" (*Restatement, Conflict of Laws*, Sec. 356[1]).

The number of guilders is specifically set out in the bonds and coupons. Bondholders who elect to receive the same could get no lesser or larger number of guilders than set forth therein despite the fluctuations of the various currencies. If a holder chose francs, for instance, he could get no more units of that currency because francs had depreciated. Respondent's reasoning would compel the Debtor to pay $1,000 for each bond in America, even though a French citizen, for reasons of his own, might have elected to take 5,180 francs in Paris, worth about 25% of the dollar amount. Such a result shows the fallacy of any such argument.

Respondents endeavor to create an ambiguity by torturing the bonds and coupons into reading as though they are instruments payable only or primarily in "gold dollars," whereas in fact, by the exercise of the choice of guilders in Holland, they become payable *solely* in a fixed number of such guilders, not measured by nor in relation to (a) gold or (b) a particular kind of coin or currency of the United States or (c) an amount in money of the United States measured thereby.

This Court may take judicial notice of the fact that all bonds and coupons are drawn by the issuing corporation and that the holders thereof had no part in the composition thereof.

We respectfully submit that there is no ambiguity; nevertheless, if any exists, the instruments must be construed against the Debtor, whose words they are. *Williston on Contracts,* Vol. II, Sec. 621 (p. 1203), and cases cited in note; *Restatement, Contracts,* Sec. 236(d); *id.,* Sec. 325(2); *Rothschild* v. *Rio Grande Western R. Co.,* 84 Hun 103, 109 (1st Dept., 1895), aff'd 164 N. Y. 594.

Respondents may argue that because instruments containing provisions for payment in multiple currencies may be or are included in the $75,000,000,000 of "gold clause" bonds referred to in the *Norman* case, and because it was decided in *Campania de Inversiones Internacionales* v. *Industrial Mortgage Bank of Finland,* 269 N. Y. 22, cert. den. 297 U. S. 705, that a "gold clause" provision in a bond is discharged by payment of lawful money, those simple (inapplicable) circumstances permit Debtor to discharge the chosen *foreign currency* provision in the instruments at bar by payment in American dollars at the face amount set forth.

The *Norman* and *Inversiones* cases dealt only with that limb of the instruments which provided for payment in gold coin. To the extent that the instruments sued upon at bar provide for payment in gold coin, they of course come within the condemnation of the *Norman* and *Inversiones* cases—in other words, to the extent (but no more) that the instruments contain a provision for payment in gold coin, the obligation to pay lawful money is substituted for the obligation to pay the gold coin. But at bar the suit is brought under another limb of the instrument (the guilder election) and inasmuch as the "gold clause" is not involved at bar, neither the *Norman* nor the *Inversiones* case condemn the payment sought by Petitioner.

Furthermore, the transaction in the *Inversiones* case was purely a domestic one, the bonds were payable *only* in gold dollars in New York, there were no foreign money alternatives in the instrument, and the New York Court of Appeals

quite properly held that in a suit brought in the Courts of that State to enforce the "gold clause" provision of the bonds, lawful money only could be recovered, but not the value of the gold coin. In other words, the New York Court applied to the *Inversiones* case the rule which this Court had applied in the *Norman* case—it struck the "gold coin" *term* attached to the dollar amount, the remainder of the instrument remaining intact.

To conclude this point, *amicus* adopts for his own summary the following masterly statement of Professor Nussbaum (84 U. of Pa. L. R., at pp. 578-579) in respect of the inapplicability of the Joint Resolution to multiple currency clauses:

> "To sum up: The multiple currency situation under both legal and legislative views is wholly different from the gold clause situation. It cannot be presumed therefore, that Congress, in impairing the gold clauses, intended to reach the multiple currency clauses. Hence, an American holder of a multiple currency bond does not evade the Joint Resolution when choosing payment in foreign currency under the terms of the bond. Even less does he directly violate the Resolution since its text is unambiguously confined to gold obligations. No true interpretation of the Joint Resolution can ever yield a different result. It has been said that the Joint Resolution is poorly drafted. However, compared with the numerous foreign statutes abrogating or encroaching upon gold clauses, the American law, which in a remarkable way utilizes foreign doctrines, is a model of carefulness. Perfect clarity is not missing with regard at least to multiple currency clauses. But still if there were an ambiguity in the text the Resolution would not be applicable to the multiple currency situation for the very material reasons expounded above."

POINT B.

Accepted Conflict of Laws doctrines are applicable in bankruptcy; the laws of Holland govern the performance of the instruments at bar; and under both American and Dutch law Petitioner's contentions as to performance are correct.

(1) The bankruptcy courts of the United States apply Conflict of Laws doctrines.

It is well established that the Federal bankruptcy courts will apply the usual Conflict of Laws doctrines in adjudicating claims and contests or in deciding any other matters arising before them which involve Conflict of Laws questions. Thus, in *In re Champion Shoe Machinery Co.*, 17 Fed. Supp. 985 (District Court, E. D. Mo.), an intervening petitioner in a reorganization under Section 77B of the Bankruptcy Act petitioned for an order directing the debtor to pay over sums collected by it as collateral on notes. The debtor's defense was that the notes in question, executed in Missouri, bore interest in excess of the statutory rate of 8%, were thus usurious and hence were discharged. However, against this contention, the court granted the order, holding as one ground for its decision that the place of performance of the contract was the State of Illinois, even though the note had been made in Missouri, and that under the Illinois law the 8% rate was not usurious. In reaching its conclusion on this phase, the court in its decision said (p. 986):

> "* * * Where a contract is usurious by the law of the place where it is made, but not usurious where the obligation is to be paid, the parties will be presumed to have contracted in accordance with the law of the place of payment and the contract will be upheld. Seeman et al. v. Philadelphia Warehouse Company, 274 U. S. 403, 47 S. Ct. 626, 71 L. Ed. 1123; Andrews v. Pond et al., 13 Pet. 65, 10 L. Ed. 61; Long v. Long, 141 Mo. 352, 44 S. W. 341; Central National Bank v. Cooper, 85 Mo. App. 383. In 66 Corpus Juris, 150, the following statement is made: 'When

> a contract is usurious by the law of the place where it was made, but the rate of interest is not higher than is lawful in the place where the obligation is to be paid, the parties will be presumed to have contracted with reference to the latter place, and the contract will be upheld, provided always that there is no evidence showing bad faith or an intention to evade the usury laws of the place of contract, * * *.'
>
> "The order prayed for is granted."

Similarly in *Clark* v. *Huckaby*, 28 F. (2d) 154 (C. C. A. 8th), cert. den. 278 U. S. 648, the Circuit Court of Appeals for the Eighth Circuit had before it a proceeding involving the validity of the lien of a chattel mortgage. The bankruptcy referee for the Northern District of Oklahoma had sustained the chattel mortgage lien as to certain store fixtures and denied the lien as to a certain stock of merchandise. The District Court in review had upheld the lien as to both items. On appeal the court, indicating that conflict principles should be applied, reversed and remanded the case.

In many other cases, Conflict of Laws doctrines have been applied in bankruptcy as a matter of course.

See: *Irving Trust Co.* v. *Maryland Casualty Co. et al.*, 83 F. (2d) 168, 171-172 (C. C. A. 2nd), cert. den. 299 U. S. 571; *In re Barnett*, 12 F. (2d) 73 (C. C. A. 2nd), cert. den., *sub. nom. United Cigar Stores Co. of America* v. *Rayher*, 273 U. S. 699; *In re Newark Shoe Stores, Inc.*, 2 Fed. Supp. 384 (D. C. Md.); *In re Motor Products Mfg. Corp.*, 90 F. (2d) 8 (C. C. A. 9th).

(2) Applying accepted Conflict of Laws doctrines to the Petitioner's proof of claim, the law of Holland,—the place where the contracts were by their terms to be performed,—governs.

With regard to Petitioner's proof of claim (R. 2) and supplement thereto (R. 104-106), the record shows that the First Terminal Bonds and coupons therein included were duly presented for payment abroad in Amsterdam, Holland, that Petitioner demanded payment of guilders in accordance

with the tenor of the instruments, and that payment was refused (R. 159-160, 169-172).

Petitioner, by demanding payment in Holland, thus fixed that country as the place of performance (*St. Louis Southwestern* case, *Pan-American Securities Corp.* v. *Fried. Krupp, Lann* v. *United Steel Works Corp.*, all cited *supra*, Cf. *Seeman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403).

Accordingly, by Petitioner's aforesaid election of the guilder alternative, the instruments as to which the election was made (see form of First Terminal Bond and coupon, *supra*, pp. 5-6) became payable in guilders as if no other alternative had ever existed, and the failure to pay the instruments in accordance with their tenor,—as that tenor was indicated by Petitioner's election,—constituted a breach as if the respective contracts had originally provided solely for the performance demanded by Petitioner in Amsterdam, Holland (*Restatement, Contracts*, Sec. 325[2]).

Succinctly, the matters connected with the performance of a contract are regulated by the law prevailing at the place of performance (*Scudder* v. *Union National Bank*, 91 U. S. 406 [1875]; *Union National Bank* v. *Chapman*, 169 N. Y. 538 [both cases involving negotiable instruments payable at a place other than the place where made]).

And:

> "The law of the place of performance determines the medium of payment in which a contract to pay money is to be performed" (*Restatement, Conflict of Laws*, Sec. 364).

(3) Under both American and Dutch law, Respondents' objections to Petitioner's proof of claim, in so far as based upon the Joint Resolution, are without merit and must fall.

In the case at bar, the choice as to the place and medium of payment was conferred by the instruments themselves and was exercised in accordance therewith. This choice was left to the holders of the instruments. Having exercised their choice to take guilders in Holland, the instruments should

be construed according to the laws of Holland—and this whether or not the Joint Resolution would have applied had the choice been exercised in America. Even if otherwise applicable to the multiple currency features (which we deny—see Point A, *supra*), the Joint Resolution cannot extend to contracts to be performed and instruments payable in Holland (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, and other cases cited on p. 17, *supra*).

There is no contention made, nor can there be, that Holland either applies the Joint Resolution or has the Dutch equivalent of a Joint Resolution. As a matter of fact, Articles 1308-1313 of the Dutch Civil Code provide that in case of alternative obligations the debtor is absolved by the delivery of one of two things contained in the obligation, and that the choice belongs to the debtor unless it has been granted to the creditor; if, where the choice has been left to the creditor, one of the two things has perished or can no longer be delivered, the creditor is entitled to the other. In the case at bar, the choice has been left to the creditor (see form of First Terminal Bond and coupon, pp. 5-6, *supra*), one of the alternatives (the "gold coin" term) can no longer be delivered, and accordingly the Petitioner as creditor is entitled to any other alternative which it elects, at bar, guilders.

An analogous situation was recently considered in England. In that case, Canada, in 1937, having abrogated gold clause obligations (and at bar we are not concerned with the "gold clause" of the instruments—only with the multiple currency feature), a foreign holder, having exercised its option to receive interest payments in London, sued in England for principal and interest measured by the gold clause of the bond which provided for payment in Canadian gold dollars in Canada or in sterling in London. The Court of Appeal held that since the contract was performable in England—the holder having elected performance in England—the English law governed and required full payment according to the gold clause (*British & French Trust Corporation, Ltd.*, v. *New Brunswick Railway Co., Ltd.*, 54 The T. L. R.

172 (1937) [Court of Appeal] [affirmed by the House of Lords, December 13, 1938, 55 The Times L. R. ....]).[12]

At bar, the payment chosen by Petitioner was lawful when the instruments were issued; it is lawful in Holland, the place of performance, to-day, when and where performance is due. It is lawful in America to-day.

As well stated by Judge Hand in his opinion (p. 12) in the *St. Louis Southwestern* case, *supra:*

> "* * * by the law of most civilized countries the legality of a contract depends upon the law of the place of performance, and a contract is enforceable, if lawful by the law of the place of making when made and if the performance is lawful by the law of the place of performance when due. Certainly that is true of our own law. Restatement of Conflict of Laws, §360. If the resolution had meant to prescribe otherwise, it would in substance have been an invasion of the prerogative of other states, and would be properly resented as contrary to the implications of mutual comity; we are justified in insisting that a statute must make such an intent plain beyond any doubt."

The Joint Resolution certainly does not make any such intent "plain beyond any doubt". To the contrary, payment of foreign moneys abroad is not even mentioned therein, much less inhibited; and its clear wording excludes any assumption that such payment was intended to be interdicted thereby.

Bondholders and couponholders, choosing guilders in Holland, are entitled to recover the full value thereof, whether American or Dutch law be applied.

---

[12] For English decisions to the effect that the law of the place of performance will govern, see: *Adelaide Electric Supply Co., Ltd.*, v. *Prudential Assurance Co., Ltd.*, 50 The T. L. R. 147 (1934); *Rex* v. *International Trustee for the Protection of Bondholders, A. G.*, 53 The T. L. R. 507 (1937). Cf. *Feist* v. *Societe Intercommunale Belge d'Electricite*, 50 The T. L. R. 143 (1934). Cf., also, *Case of Serbian Loans*, Perm. Court of Int. Just., Series A, No. 20 (1929); *Case of the Brazilian Loans*, *id.*, No. 21 (1929). See, also, *Dicey, Conflict of Laws* (2d Ed.), 563.

POINT C.

The functional approach to Respondents' interpretation of the Joint Resolution discloses the fallacy of any such interpretation.

Amicus of course agrees, without argument, that if a holder of a multiple currency bond presents the same in the United States and demands gold dollars, the Debtor's obligation in respect of the bond would be fully discharged by the payment of an equal number of present lawful American dollars. This would be strictly according to the tenor of the instrument itself, the demand having been made in America, the currency selected being coin or currency of the United States, and the Joint Resolution simply striking the "gold coin" term from the instrument, and permitting the payment of the same number of present lawful dollars as is exactly specified in the instrument itself (say, $1,000 in currency of the United States in the case of a typical bond).

Let us, however, apply the pragmatic test to Respondents' interpretation of what happens or should happen upon presentation of the same bond (and coupon) in Amsterdam, Holland, and demand for the specific number of foreign monetary units expressed in the instrument (in the typical case, 2,490 guilders):

(1) May the Debtor tender in Amsterdam, Holland, $1,000 in currency of the United States for each bond of 2,490 guilders and thereby fully discharge its obligations on the bond?

(2) May the Debtor tender in Amsterdam, Holland, for each bond that number of guilders (less than 2,490) which $1,000 in currency of the United States would purchase in Holland?

(3) May the Debtor refuse to make any payment at all in Holland and insist that it has the right to pay the bond at its office or agency *in the United States*, instead of in Holland, the place of payment selected by the holder (in whom is vested the choice of currencies and the choice of the place of payment)?

(4) If the choice of the place of payment thus passes to the Debtor, may the Debtor pay *in the United States* $1,000 in currency of the United States, and thereby discharge the obligation created by the demand in Holland for the payment of 2,490 guilders in Holland?

(5) If the choice of the place of payment thus passes to the Debtor, may the Debtor pay in the United States that number of Dutch guilders (less than 2,490) which $1,000 in currency of the United States would purchase, and thus discharge the obligation to pay 2,490 guilders in Holland created by the holder's demand in Holland?

(6) If the choice of the place of payment thus passes to the Debtor, is the foreign holder, for whom the foreign places and currencies of payment were more particularly provided, forced to make presentation and demand in America?

(7) Must such last-mentioned presentation and demand be for payment in dollars?

(8) If the reasoning adopted by Respondents in respect of illegality (and the unfounded inference necessarily flowing therefrom that the instruments here sued upon are based upon an illegal consideration) is sound, is the entire bond, as well as each and every provision thereof, and the obligations contained therein, void, and, if so, is the Debtor relieved from any payment thereon whatever?

In asserting (in effect) that the Debtor is entitled to tender in the United States $1,000 in currency of the United States for each bond of 2,490 guilders, although payment thereof was demanded in Holland in 2,490 guilders in Dutch currency, Respondents have failed to answer or consider the very material questions set forth above.

And yet if the burden of Respondents' contentions is to prevail, all the above questions must be answered in the affirmative, though confusion worse confounded would result. To state the questions and to assume the affirmative answers made necessary by Respondents' interpretation of the Joint Resolution, is to state a complete refutation to Respondents' arguments at bar, and to disclose their fallacy.

Congress could never possibly have anticipated or intended any such results. Certainly there is no word or syllable in the Joint Resolution that would lead any legislator, or any court construing the legislation, to believe that any such result was anticipated or intended. The debates in Congress contain no word or syllable that would indicate that any such result was or could have been anticipated or intended. The Joint Resolution itself expressly limits its impact to (a) gold or (b) a particular kind of coin or currency of the United States or (c) an amount in money of the United States measured thereby. It does not affect and *was not intended* to affect any payments of foreign money units, either in the United States or abroad. The only tenable and reasonable construction of the Joint Resolution is that contended for by Petitioner and *amicus*.

The functional analysis above—an analysis necessary and vital to the correct interpretation of the Joint Resolution—leads irresistibly and unmistakably to the conclusion that the Joint Resolution does not affect the multiple currency provisions of the instruments sued upon.

POINT D.

Damages should be assessed as of the date of the filing and approval of the petition for reorganization.

In respect of damages for breach of a contract to deliver foreign moneys, this Court, in *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, 519, said as follows:

> "An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. *Legal Tender Cases*, 12 Wall. 457, 548, 549."

See, also: *Hicks* v. *Guinness*, 269 U. S. 71; *Zimmermann* v. *Sutherland*, 274 U. S. 253.

The following bankruptcy cases make it clear, we think, that December 12, 1935 (the date of the filing and approval of the petition for reorganization) is the proper date for assessing damages in a bankruptcy proceeding. *Central Trust Company* v. *Chicago Auditorium Association*, 240 U. S. 581, where claimant was allowed to prove for the full value of a license to carry baggage and passengers, which license was deemed to have been breached by the proceedings; *Samuels* v. *Drew* (*Claim of El Dorado Oil Works et al.*), 292 Fed. 734 (C. C. A., 2d), where the Circuit Court of Appeals held that the appointment of receivers had created a fund for the benefit of creditors, and added at page 736:

> "The participation in the fund by creditors is determined by the value of the claim at the time when the fund is created, and that is the date of the appointment of the receivers. These principles were enunciated in *Merrill* v. *National Bank, etc.*, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640."

Samuels v. *Drew* (*Claim of El Dorado Oil Works*), 286 Fed. 278 (D. C., S. D. N. Y.), where the measure of damages for the anticipatory breach of an insolvent's contract to purchase cocoanut oil was fixed as the difference between the contract price and the market price on the date of the reciversbip; *Samuels* v. *Drew* (*Claim of Produce Brokers' Co., Limited*), 286 Fed. 281, where it was held, in connection with sterling bills of exchange on which the insolvent was liable, that the amount of all claims against the estate is to be ascertained as of the date of the appointment of the receiver, and that sterling claims "are to be allowed in dollars at the rate of exchange prevailing on October 30, 1920" (p. 282), said date being the date of the appointment of the receivers; *Samuels* v. *Drew* (*Claim of Banco Nacional Ultramarino*), 296 Fed. 882 (C. C. A., 2d, 1924), where it was held, on two instruments for the payment of pounds sterling, that these were executory contracts, terminated by the appointment of the receivers on October 30, 1920, and where the claim for damages for the failure to pay the sterling was computed by the Circuit Court of Appeals as of

the date of the appointment of the receivers (citing, also, *Samuel* v. *Drew*, C. C. A., 292 Fed. 733; *Pennsylvania Steel Co.* v. *New York City Railway Co.*, 198 Fed. 721).

Cf. Rochm v. *Horst*, 178 U. S. 1.

Our views in this regard are likewise supported by clause (*l*) of amendatory Section 77 of the Bankruptcy Act, reading as follows:

> "(*l*) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

See, further, Bankruptcy Act, Sec. 63(a) (U. S. C. A., Title 11, Sec. 103); *Remington on Bankruptcy*, Vol. 2, Sec. 757, and cases cited; *In re Simon*, 197 Fed. 105 (D. C., W. D. N. Y.); *Board of County Commissioners* v. *Hurley*, 169 Fed. 92 (C. C. A. 8th, 1909); *Maynard* v. *Elliott*, *supra*.

Whether, therefore, in an ordinary civil suit in the Federal Courts, the so-called "breach-day" rule be applied (as indicated in *Hicks* v. *Guinness*, *supra*), or the so-called "suit-day" rule (as indicated in *Deutsche Bank* v. *Humphrey*, *supra*),[13] or the so-called "judgment-day" rule, it is respectfully submitted that in a bankruptcy proceeding the date of the filing and approval of the petition (at bar, December 12, 1935) is the proper date for assessing damages for failure to deliver foreign moneys abroad.

---

[13] It would seem that at bar the "moment when the suit was brought" would be the date of filing the proof of claim.

IV.

Conclusions Concerning the Questions Raised by the Petitioner.

1. (a) The Joint Resolution does not deprive the bondholders and coupon holders of the right to choose foreign currencies abroad.

(b) If it does so operate, it is an unconstitutional exercise of the powers of Congress.

(c) In any event, the First Terminal Bondholders and coupon holders would be entitled to damages for such deprivation.

2. Claims upon the First Terminal Bonds and coupons, based upon proper choice of guilders in Holland, should be allowed, and damages assessed as of the date of the filing and approval of the petition for reorganization herein, viz., December 12, 1935.

Dated, New York, January 14, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., as *Amicus Curiae*,
30 Pine Street,
New York, N. Y.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

APPENDIX "A."

PUBLIC RESOLUTION—No. 10—73D CONGRESS
[H. J. Res. 192]

JOINT RESOLUTION

TO ASSURE UNIFORM VALUE TO THE COINS AND CURRENCIES OF THE UNITED STATES.

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restrictions; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts, Now, therefore, be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal

tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national associations.

SEC. 2. The last sentence of paragraph (1) of subsection (b) of section 43 of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933, is amended to read as follows:

"All coins and currencies of the United States (including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations) heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues, except that gold coins, when below the standard weight and limit of tolerance provided by law for the single piece, shall be legal tender only at valuation in proportion to their actual weight."

Approved, June 5, 1933, at 4.40 p. m.